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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM A. FICKLING, JR., *et, al.*

Petitioners,

v.

ALEXIS M. HERMAN, SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF OF PETITIONERS

The Solicitor General expends 27 pages in attempting to demonstrate the seemingly simple proposition on which he rests his opposition to this Court's review—*i.e.*, that the decision below fully accords with this Court's cases and with the decisions of other courts of appeals. That prolixity is not surprising, given the sheer number of inconsistent precedents the Solicitor General must navigate around in his attempt to deny the existence of a conflict. The government's efforts to conjure up factual complexity, and its utter inability to proffer any legal theory that harmonizes the cases on which petitioners rely, serve only to confirm the need for this Court's review.[1]

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[1] The Solicitor General states in passing that this Court should withhold review on the ground that this case "is in an interlocutory posture, because the court of appeals at this stage has merely remanded for consideration of the Secretary's claim on the merits." Br. in Opp. 10. The fact that no final judgment has been entered is a proper (and dispositive) objection to cases coming to this Court from the *state* courts under 28 U.S.C. 1257, *see Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), but *not* to cases brought before this Court from the *federal* system under 28 U.S.C. 1254. Indeed, this Court routinely grants review in federal cases in the same "interlocutory" posture as this case, including some of the leading ERISA precedents, *e.g., Inter-Modal Rail Employees Ass'n v. Atchinson, T. & S.F. Ry.*, 117 S. Ct. 1513 (1997); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), and several cases that the Court has already heard and decided during this Term alone, *e.g., Hughes Aircraft Co. v. Jacobson*, slip op., No. 97-1287 (U.S. Jan. 25, 1999); *NYNEX Corp. v. Discon, Inc.*, 119 S. Ct. 493 (1998). The suggestion that petitioners should be taxed with the costs and burdens of a full trial and appeal is particularly indefensible given petitioners' compelling, and certworthy, res judicata defense. The whole point of the doctrine of res judicata is to spare courts and parties the burden of trying claims that, like the Secretary's, were previously adjudicated on the merits.

1. The Solicitor General concedes that the court of appeals' judgment rests on the broad proposition that there is "[a] well-established general principle" that government agencies are not bound by ordinary principles of res judicata when they sue under a federal statute that "implicates" public interests. Br. Opp. 9, 10-11; *see also* Pet. App. 22a-23a. The Solicitor General does not, however, identify a single case from this Court in which that "general principle" was in fact "established."

That failure is telling given the volume of federal government litigation that has occurred since 1789. The Solicitor General certainly would have cited such manifestly relevant and dispositive precedent from this Court if it existed. He has cited no such case, opting instead to rest on a bald characterization of the res judicata rule he urges as "established." This Court has frequently granted review where, as here, the Solicitor General asserts the existence of an "established" and broadly applicable rule that is not adequately supported by reference to this Court's cases. *See, e.g.*, *Republic National Bank v. United States*, 506 U.S. 80, 84 (1992) ("the Government relies on what it describes as a settled * * * principle * * *. We, however, find no such established rule in our cases").

Significantly, the Solicitor General does *not* defend on its own merits the Eleventh Circuit's conclusion that this Court's decisions in *City of Richmond v. United States*, 422 U.S. 358 (1975), and *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683 (1961), require that the Secretary of Labor be permitted to seek monetary relief for the sole benefit of the same plan beneficiaries who previously sued and resolved the identical legal claims. As we explained in detail in the petition, without any pertinent rebuttal from the Solicitor General, neither *City of Richmond* nor *Sam Fox Publ'g* in fact stands for the broad proposition asserted by the court of appeals, because each case involved government litigation that, by its nature, primarily or exclusively vindicated broad-based public interests, not the private pecuniary interests of private persons. The most that the Solicitor General can suggest is

that two *commentators* have read those two decisions and other similar cases broadly enough to support the decision below. Br. in Opp. 10-11 (citing 18 Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4458, at 520 & n.40 (1981), and 18 James W.M. Moore, *Moore's Federal Practice* § 131.40[3][e][ii][B], at 131-149 & n. 89 (3d ed. 1998)). If true, that contention would at most establish that some academics have made the same mistake that produced the decision below—not that the decision below correctly read this Court's cases.[2]

In fact, however, neither of the commentators cited by the Solicitor General even remotely asserts that a federal government agency is ordinarily free to bring a new suit seeking *monetary* relief for the *sole benefit* of a party that previously litigated the identical monetary claim to final judgment. To the contrary, Professors Wright and Miller expressly *reject* the proposition that a government agency may sue to obtain monetary relief for persons who previously litigated the same claims to judgment: "Private litigation is much less likely to foreclose public litigation *except to the extent that the government may seek individual benefits for a previously unsuccessful party*." 18 Wright *et al.*, *Federal Practice and Procedure — 1998 Supplement* § 4458, at 436 (1998) (emphasis added). In support of that italicized language, Professors Wright and Miller cite and discuss *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), and the EEOC cases that the Eleventh Circuit refused to follow in this case—*i.e.*, the very same authorities that petitioners urge conflict with the decision below.

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[2] The Solicitor General further notes that Professors Wright and Miller also rely on *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963). That case, like the Court's more recent decision in *Mississippi v. Louisiana*, 506 U.S. 73, 78 (1992), involved a boundary dispute between two sovereigns and thus is completely irrelevant to the issue presented by this case, *viz.*, whether a government may be bound in a case in which it seeks only a monetary award for the benefit of a particular private party.

2. The Solicitor General's assertion that the decision below does not conflict with cases from other circuits does not withstand even cursory scrutiny. In a transparent effort to sweep under the rug many of the conflicting lower cases, the Solicitor General consigns to a footnote a number of the authorities cited by petitioners, in which various federal government agencies were found to be precluded by prior private litigation. Br. in Opp. 20 n.12. While the Solicitor General suggests in cryptic parentheticals that those cases did not involve the same issue of representative claim preclusion raised by this case, that suggestion is without merit.

One example suffices to make the point. The First Circuit's decision in *Donna-Lee Sportswear*, which even the commentators on which the government relies cite as an example of the preclusion principles that prevail in the lower courts, is rather unhelpfully described by the Solicitor General as a case turning on "particular facts." Br. in Opp. 20 n.12. The Solicitor General makes little effort to describe the "particular facts" on which that decision purportedly turned, much less to explain how those facts differ in any legally significant respect from the facts of this case. That is doubtless because the only "facts" that the First Circuit found legally dispositive in *Donna-Lee Sportswear* are the same facts that the Eleventh Circuit ruled were without legal significance here. According to the First Circuit, it was sufficient for preclusion that the government's lawsuit "primarily [furthered] the private interests of * * * private parties" and that those interests were "the same interests which were fully and appropriately adjudicated" in an earlier federal court action involving those parties. *Donna-Lee Sportswear*, 836 F.2d at 38.

Indeed, the First Circuit expressly rejected in *Donna-Lee Sportswear* the same claim advanced on behalf of the Secretary here—*i.e.*, that federal government agencies always and necessarily further distinct public interests when they sue to enforce federal statutes:

> While we recognize that vindication of the labor policies enacted into law by Congress generally

> rests with the [agency], and that labor relations between unions and employers necessarily involve some public interest, *in this case it is the private interest of the disputants that predominates.* * * * Accordingly, we are not persuaded that merely because the NLRB is a government agency * * * we should permit the Board to ignore the district court's judgment.

Donna-Lee Sportswear, 836 F.2d at 38 (emphasis added). Here, of course, the monetary relief sought by the Secretary is for the *sole* benefit of the same private party—*i.e.*, the plan—whose claims were previously adjudicated. Under the res judicata rule that prevails in the First Circuit, that fact alone would suffice to preclude the government's suit against petitioners.

The Solicitor General fares no better in his attempt to distinguish the EEOC cases that the Eleventh Circuit refused to follow in this case. The most noteworthy aspect of the Solicitor General's analysis are his repeated suggestions that those court of appeals' cases—from several circuits with authority over the greater part of the Nation—were wrongly decided. Br. in Opp. 18 ("even if those decisions are correct * * *"); *id.* at 19 ("assum[ing] for present purposes" the correctness of those decisions, while suggesting with "but see" citation that they are contrary to this Court's cases). That the Solicitor General feels compelled to preface his failed efforts to "distinguish" those cases by suggesting repeatedly that those circuits are wrong speaks volumes about his contention that there is no division of lower court authority warranting this Court's intervention.

The Solicitor General also attempts to avoid certiorari by highlighting the Eleventh Circuit's remark that the EEOC cases involved "the different statutory enforcement schemes of Title VII and the ADEA." Br. in Opp. 19 (citing Pet. App. 25a n.22). The Eleventh Circuit expressed that view only as a fallback position, however, after first stressing (in a passage conspicuously absent from the Brief in Opposition) that its own EEOC precedent was not consistent with those "cases

from other circuits." Pet. App. 25a, n.22. And, as we pointed out in the petition, the facile suggestion that a different res judicata rule can be justified by the text of Title VII and the ADEA simply cannot explain the conflicting cases. *See* Pet. 15, n.10. While the ADEA precludes private actions once the EEOC brings suit, there is no similar language in Title VII—yet courts apply the same preclusion principles in both types of cases. More importantly, there is no statutory language in *either* Title VII or the ADEA even remotely precluding *suits by the agency.* As the lower courts outside the Eleventh Circuit have made abundantly clear, *that* result flows solely from ordinary principles of representative claim preclusion—*i.e.*, from the same fundamental legal principles that are at issue here. *See, e.g., EEOC v. United States Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990).[3]

The petition made quite clear the manifest infirmity of any statute-based attempt to distinguish the EEOC cases. Pet. 15, n.10. The government nonetheless seeks to reconcile the cases on that ground, but offers no response to our arguments or any basis for concluding that those cases turned on specific statutory language affirmatively expressing Congress' intent to apply ordinary principles of res judicata to the EEOC. Given the Solicitor General's decision to ignore our arguments, the only reasonable inference is that he lacks convincing means of rebutting them.[4]

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[3] As the Third Circuit made clear in *United States Steel*, the only relevance of the particular statutory context is a determination whether the agency "has representative responsibilities when it initiates litigation to enforce an employee's rights." 921 F.2d at 494. Here, the Secretary of Labor is clearly suing as a representative of the plan to the extent she seeks monetary relief solely for the plan's benefit. *Id.* at 496.

[4] The Solicitor General likewise has essentially chosen to ignore our arguments under Fed. R. Civ. P. 23, which he dismisses with the assertion that the *Knop* plaintiffs did not "adequately represent" the interests of the Secretary of Labor. Br. in Opp. 21, n.13.

3. The Solicitor General also errs in asserting that the Eleventh Circuit's decision is consistent with the "principles of res judicata that this Court has recognized in * * * *Heckman v. United States*, 224 U.S. 413 (1912), and *Chicago, Rock Island & Pacific Railway v. Schendel*, 270 U.S. 611 (1926)." Br. in Opp. 15. According to the Solicitor General, *Heckman* does not stand for any general principle of res judicata law, but merely holds that "the federal government's unique trust relationship with the Indians" precludes those Indians from asserting claims previously litigated by the government on their behalf. Br. in Opp. 15. With respect to *Schendel*, which clearly stated the government "should be held estopped" from seeking benefits for a private party who previously sued in her own name, 270 U.S. at 619, the Solicitor General emphasizes that the case involved a worker's compensation claim "for the sole benefit of a widow," Br. in Opp. 16, whereas "the Secretary represents *more* than merely private interests whenever she brings an enforcement action under ERISA." *Id.* at 17 (emphasis in original).

The short answer to the Solicitor General's narrow reading of *Heckman* and *Schendel* is that the lower courts (other than the Eleventh Circuit) do not agree with it. That crabbed reading, therefore, cannot justify a denial of certiorari to examine the correctness of the distinctions now proffered by the Solicitor General.[5] For example, the Third Circuit, evidently

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The point, of course, is that the party represented in the *Knop* action—*i.e.* the plan—is the *same* party in whose behalf the Secretary now seeks additional monetary relief.

[5] Those distinctions are unpersuasive in light of this Court's cases. In *Nevada v. United States*, 463 U.S. 110, 135 (1983), this Court suggested that *Heckman*, while involving the government's representation of Indians, sets forth the same principle of representative claim preclusion that is more broadly stated in the Restatement (Second) of Judgments § 41(1)(d) (1982). Indeed, that case applied that principle not only to an Indian tribe, but also to an ir-

unpersuaded that *Heckman* and *Schendel* set forth res judicata principles applicable only to government suits on behalf of Indians and widows, relied extensively on those cases to conclude that the EEOC cannot sue to obtain monetary relief for employees who had previously litigated their own claims. *United States Steel Corp.*, 921 F.2d at 494, 493. Indeed, as noted in the petition, the Third Circuit expressly rejected the claim advanced by the Solicitor General here—*i.e.*, that federal agency suits *always* advance some public interest—by emphasizing that the doctrine of res judicata requires courts to distinguish between cases in which the agency seeks individual benefits for private parties and cases that seek broader relief for the public at large. When the agency "seeks individualized benefits * * * for particular grievants, * * * [it] functions to that extent as their representative, and the doctrine of representative claim preclusion applies." *Id.* at 496; *see also EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (expressing Seventh Circuit's agreement with Third Circuit's analysis of res judicata issue).

The Solicitor General has proffered no persuasive reason for applying a different rule of res judicata here. His argument begins and ends with the bare assertion that the Secretary *always* represents the public interest, because Congress clearly thought that the protection of pension plans is quite important to the public. Congress just as clearly thought the same thing with respect to laws aimed at deterring and remedying racial discrimination, sexual harassment and other forms of employment discrimination that the EEOC is charged with combating. And while the Solicitor General argues that lawsuits by the Secretary further government interests beyond recovery of plan assets, such as "ensuring uniform compliance with ERISA [and] exposing and deterring plan asset mismanagement," Br. in Opp. 11, he does not ex-

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rigation district whose interests had been represented by the United States in earlier litigation. *See Nevada*, 463 U.S. at 137-40.

plain why injunctive and declaratory relief, which would be available under the rule of the EEOC cases (and was obtained by the Secretary in this case), would not fully satisfy those objectives. Indeed, the same general "deterrence" arguments could just as easily be made in the EEOC cases, but the majority of the courts of appeals have found those arguments insufficient to overcome the plain fact that relief is being sought for the sole benefit of specific private parties.

The sole purportedly unvindicated "public" interest asserted by the Solicitor General in this case consists of the alleged availability of civil penalties under Section 502(l) of ERISA, 29 U.S.C. 1132(l). Br. in Opp. 13. Those penalties, however, are *not* available against petitioners, who have been sued by the Secretary solely as *non*fiduciary parties in interest. *See Mertens v. Hewitt Associates*, 508 U.S. 248, 260-61 (1993) (explaining that the "other person" referenced in Section 502(l) must be a "co-fiduciary," rather than a non fiduciary party in interest). Thus, that purported public interest provides no justification for denying *petitioners* the benefit of fundamental principles of res judicata. In any event, the Solicitor General's reliance on Section 502(l) is circular, because nothing in that statute suggests that the Secretary may sue, or that the statutory penalty should be available, in cases in which private litigants have already fully resolved the same legal claims on behalf of the same plan. Because nothing in Section 502(l) purports to override background principles of res judicata, Congress must be presumed to have intended that those principles would be fully applicable here as they are elsewhere. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("where a common-law principle is well-established * * *, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident'") (citation omitted).

4. The Solicitor General also has failed to offer any persuasive reason for withholding review on the second question presented by the petition: Whether the Secretary may proceed against nonfiduciary parties in interest who allegedly

participated in a prohibited transaction. The Solicitor General concedes that this Court expressly left that question open in *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996), *see* Br. in Opp. 26-27, though he understandably fails to note that the best this Court could say for the position embraced by the Eleventh Circuit is that it is "not necessarily wrong." 517 U.S. at 889 n.3. Indeed, while the Solicitor General concedes that petitioners violated no duty imposed by ERISA, he devotes much of his attention to a restatement of the same statutory argument for imposing liability on nonfiduciaries—with particular emphasis on the breadth of the word "redress" in Section 502(a)(5), 29 U.S.C. 1132(a)(5)—that did *not* carry the day when this Court considered it in *Mertens v. Hewitt Associates*, 508 U.S. 248, 253-54 (1993). *See* Br. in Opp. 22-23. That the Solicitor General feels compelled to rely upon an argument that has already been rejected by this Court serves only to confirm the urgent need for this Court's prompt resolution of the question it expressly left open in *Lockheed*.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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